MALICE AND UNLAWFUL INTERFERENCE.

THE decision in the case of Allen *v.* Flood,[1] rendered by the House of Lords in December, 1897, is the most recent judicial contribution to an interesting chapter in the law of torts. The question presented in the case was: Is it unlawful for one person to interfere with the employment of another where the act of interference induces no breach of contract and is not accompanied by either fraud or violence? The House of Lords answers this question in the negative. The case aroused a considerable popular interest for the reason that it was generally regarded as a test case upon the right of trade-unions to interfere between employers and employees. It appears, however, from the facts as established by the evidence, that no question of trade-unions' rights or liabilities was presented, and that the decision proceeded upon considerations somewhat technical in their nature, and which the public at large may perhaps fail to appreciate.

The facts of the case were, briefly stated, these: The plaintiffs, Flood and Taylor, were shipwrights doing both wood and iron work on vessels of all kinds. In many English docks, including the Glengall Iron Company's Regent Dock in London, it is customary that wood and iron work is done by separate sets of men, and the plaintiffs, when employed in that dock, did woodwork exclusively. They were so employed in April, 1894, together with other shipwrights, among them a number of boilermakers exclusively engaged on iron-work, the employment being by the job, but subject to termination at the will of the employer. The boilermakers belonged to a powerful union consisting of forty thousand members. This union was strongly opposed to the same men doing both wood and iron work. It became known to some of the boilermakers that Flood and Taylor had been employed in a dock where wood and iron work was done by the same men, and where they had presumably worked on both. Allen, the defendant, a delegate of the Boilermakers' Union, was informed of the fact, and asked the manager of the Glengall company to discharge Flood and Taylor, warning him that otherwise all the boilermakers would be called out. The man-

[1] Times Law Reports, Dec. 15, 1897.

ager complied, and Flood and Taylor were discharged. It appeared from the evidence that the members of the Boilermakers' Union constituted by far the greater portion of the force employed by the Glengall Iron Company. The manager understood from what Allen said, "that he had only to hold up his finger and all the men would knock off, and that he would call the men out if Flood and Taylor were not discharged, and he believed the threat would be enforced unless he submitted and discharged them at once," so that he virtually acted upon Allen's dictation. The discharged men thereupon brought action against Allen, and joined as defendants, Knight, the general secretary, and Jackson, the chairman of the union; but the evidence failed to show that the latter were responsible either for Allen's appointment or for his action. As it was assumed that the Glengall Iron Company had the right to terminate the contract with the plaintiffs at any time, there remained as the only cause of action that the defendant maliciously induced the company not to employ the plaintiffs, and upon this latter theory the case was considered on appeal.

The case was first tried in the Queen's Bench Division before Justice Kennedy and a jury.[1] The jury having answered the question, whether Allen maliciously induced the company to discharge or not to engage the plaintiffs, in the affirmative, judgment for damages was given against the defendant, who thereupon appealed. In the Court of Appeal, where the case was argued in 1895, this judgment was affirmed by three judges, Lord Esher, the late Master of the Rolls, writing the principal opinion.[2] The case came before the House of Lords, December, 1895, and there being a diversity of opinion, a rehearing was had in March, 1897, and the exceptional course was resorted to of asking eight judges of the High Court to hear the argument and tender their advice. Of these eight judges, six gave their opinion in favor of affirmance, two in favor of allowing the appeal.[3] But now the Lords reverse the original decision by a vote of six to three, the Lord Chancellor siding with the minority, while Lord Herschell, a former Lord Chancellor, pronounces in favor of Allen. Of the twenty-one judges who heard the case in all its stages, thirteen — of whom three were law lords — held there was a good cause of action, and only eight — but six law lords among them — denied the existence of an actionable wrong.

[1] 64 L. J. Q. B. 666.
[2] Ibid. 672.
[3] The principal opinions were printed in the London Times of Sept. 4, 1897.

According to the theory of the lower courts and the dissenting judges, every one has a right to employ his labor and pursue his occupation free from undue interference. The interference is undue when it is without just cause or excuse. The absence of just cause and excuse in an act calculated and intended to cause damage constitutes malice; and if damage results, a cause of action arises. The right contended for depends, therefore, upon the spirit or motive of the act by which it is disturbed. "If," the Lord Chancellor says, "the representative of the men (Allen) had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union, because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did."

This theory is held to be the logical result of a series of earlier decisions, principally the cases of Lumley *v.* Gye,[1] Bowen *v.* Hall,[2] and Temperton *v.* Russell.[3] In Lumley *v.* Gye it had been held that to induce a person engaged to render personal services to break his contract, gives to the other party to the contract a cause of action. In Bowen *v.* Hall the Court of Appeal affirmed this doctrine, and extended it to the inducement of breaches of contracts other than for personal services. In Temperton *v.* Russell, likewise decided by the Court of Appeal, it was charged that there had been inducement, not only to break existing contracts with the plaintiff, but also not to enter into new contracts with him; but as far as the prevention of new contracts was concerned, that was also charged to have been brought about by combination and conspiracy, and this element entered clearly into the decision.

It appears that in each of these cases there was a violation of a right more tangible than merely the unobstructed opportunity to form relations with others, that the right violated was a subsisting contractual relation. These cases, therefore, simply establish the principle that a contractual obligation operates not merely upon the person bound to performance, but upon every one else, in so far as he must not procure a breach of that obligation; the right *in*

[1] 1853, 2 Ell. & Bl. 216.
[2] 1881, 6 Q. B. D. 333.
[3] 1893, 1 Q. B. D. 715.

personam is thus made in another aspect a right as against the whole world. This principle was certainly a new one, for the old rule against enticing away a servant was based upon the peculiar economic and social status of menial employees, and the advance was resisted by dissenting judges. It must also be admitted that the principle is not quite free from difficulty, for the conception of the violation of a right *in personam* by a third party is somewhat strained; still it is intelligible that the law should impose a general duty to abstain from procuring violations of existing contracts. As a matter of fact, however, the decisions mentioned did not express the principle unqualifiedly in this way; it was intimated in Bowen *v.* Hall that it might be lawful to persuade another to break his contract, and stress was laid in all three cases upon the *malicious* procurement of the violation. "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act if injury ensues from it. The act complained of in the present case is therefore, because malicious, wrongful."[1] That the violation of an existing contract was procured, seemed not so important as that there was a malicious procurement of something which led to damage and injury. Therefore it was also said by one of the judges in the later case of Temperton *v.* Russell, with reference to the charge that the formation of new contracts had been prevented: "I am unable to see any distinction in principle between forcing a person to break an existing contract and preventing a person from entering into future contracts. In both cases there is the same wrongful, because malicious, intent."[2] It will, however, be remembered that, with reference to the prevention of these future contracts, the cause of action was conspiracy, and the liability was recognized on that ground.

Flood *v.* Allen was the first case in which the question was presented: Is it actionable for one man to induce another to terminate a contract which is subject to termination at pleasure, — to induce, in other words, a lawful and not an unlawful act, merely because the inducement is coupled with an intent to injure? The judges who held for the plaintiff believed that they were carrying the previous cases only to their logical conclusion, if they applied the doctrine that malice was actionable to the facts of

[1] Bowen *v.* Hall, per Lord Brett.

[2] 62 L. J. Q. B. 412, per Lord Esher.

the present case; and there were undoubtedly strong *dicta* to support them in that view. They had, moreover, two old cases to rely upon, which might be used as authorities for the proposition that malice constitutes a cause of action: Carrington *v.* Taylor[1] and Keeble *v.* Hickeringill.[2] Both were cases in which a liability was enforced for wilfully discharging firearms near a decoy pond of another person for the purpose of driving away ducks or other wild-fowl that might otherwise have come there. The opinion in Keeble *v.* Hickeringill was delivered by Holt, C. J., who expressed himself very strongly in favor of liability for malicious acts damaging another, though no definite or tangible right is invaded. "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." Violence and malice are thus placed on a par, and the pursuit of a livelihood or a lawful calling declared to be a right protected as against others. The test of malice is the absence of lawful justification or excuse; any one may cause damage and loss of profit to a schoolmaster by setting up a rival school, but he becomes liable if without such justification, from spite or ill-will, he induces the scholars to stay away from the school. Great reliance was placed on the Hickeringill case and the illustrations given in Holt's opinion, in order to prove the actionable character of malicious interference with another person's livelihood.

At the same time it had to be admitted that malice does not always constitute a cause of action. When the malicious act consists in a use of one's property not otherwise forbidden by law, there is no redress. So if instead of discharging firearms to drive the wild-fowl away from his neighbor's decoy pond, a man sets up a decoy pond on his own land for the same purpose, the law will not inquire into motives. That a person may stop the percolation of underground waters from his own to his neighbor's land, was established by the decision in Chasemore *v.* Richards,[3] and that the evident purpose of such action is to impair a city's water supply, and force the city to buy the land of the interfering owner, makes no difference.[4] "The only question," Lord Justice Lindley said in the case last mentioned, "a court of law or equity can consider is whether the defendant has a right to do what he threatens and

[1] 11 East, 571 (1809).

[2] Decided 1706, reported fully in a note to Carrington *v.* Taylor.

[3] 7 H. L. C. 349 (1859).

[4] Mayor of Bradford *v.* Pickles, 64 L. J. Ch. 101 (1895).

intends to do. If he has, he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be. This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable."

According to this distinction the tortious character of malice would depend not merely upon the interest invaded or impaired, or upon the motives dictating the act, but further upon the difference of acting in the exercise of property rights and acting apart from this tangible basis of right.

What, then, is the precise meaning of malice as a tort, according to the authorities cited? The idea seems to be that there must be some interference with a lawful occupation from which loss and damage results; that this interference must not merely consist in some mode of using one's own property, especially one's own land; and that the interference must proceed from some intent to injure. If the damaging act invades some right otherwise protected by means otherwise unlawful, if it constitutes trespass, nuisance, libel or slander, or fraud, the gist of the action is not malice pure and simple, but the liability is based upon conditions and circumstances which can be defined without reference to motive and disposition, although motive may enter into the act otherwise defined, as a qualifying and decisive element, as it does in certain forms of libel and slander; but here we have to deal with cases in which the existence or non-existence of a protected right depends entirely upon the motive, disposition, or state of mind of one person with reference to another.

It is this conception of malice which the House of Lords now declares untenable. It is declared that the unlawfulness of an act cannot be made to depend solely upon the intent with which it is done, if there is no impairment of a right otherwise definable. Malice cannot constitute a cause of action by itself, although it may enter as an essential element into other causes of action. Thus, where a libellous communication is made under qualified privilege, it is necessary to show malice to establish liability; but malice is here only required to destroy a privilege: eliminate the privilege, and a clear legal wrong, because the invasion of a clear right, remains, apart from malice. But in Allen *v.* Flood, as it appeared to the House of Lords, there was, apart from malice, no right sufficiently definite to require or be entitled to legal protection, and malice by itself was not recognized as a legal cause of action.

In point of authority and precedent, the House of Lords treated the expressions of opinion in Lumley *v.* Gye and Bowen *v.* Hall as

mere *dicta*, and properly so, since aside from the question of malice, a definite right, an existing contractual relation, had been disturbed in each of these cases. Temperton *v.* Russell, in so far as the cause of action was the inducement not to enter into new contracts, was a case of conspiracy. In so far as it seems to hold such inducement actionable irrespective of conspiracy, Lord Herschell holds that there is a chasm between it and the preceding cases, and that it made an entirely new departure. A more serious difficulty might have been presented by Keeble *v.* Hickeringill, but the House of Lords passed over it lightly. "I am very far from suggesting," Lord Watson said, "that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is directly in point, and its principle has since been recognized and acted upon." Lord Herschell ignores the case. Lord Macnaghten says: "There is not much help to be found in the earlier cases that were cited at the bar, — not even, I think, in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be."

In point of principle the House of Lords insists that there cannot be a legal wrong without a legal right, and that a right to be protected against malice should not be recognized, as long as malice is not a definite legal conception. The vice and defect of the overruled opinions had been that neither the right nor the wrong had been clearly defined. "We have been invited to define malice," Lord Esher said in the Court of Appeal. "The Court will not define malice any more than it will define fraud. All plain men know what is meant by saying that a man has acted maliciously. . . . The jury had a right to find, as they have found, that Allen acted maliciously." This attitude is squarely opposed by Lord Herschell. "If acts are or are not unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were."

The Mogul Steamship Company case [1] is cited repeatedly in the

[1] Mogul S. S. Co. *v.* McGregor, Gow, & Co., 1892, App. Cas. 25, 61 L. J. Q. B. 295.

various opinions; some of its *dicta* are relied upon by the lower courts and dissenting judges, the decision itself by the House of Lords. The case is really not in point, but it is instructive, and throws considerable light upon the whole problem under discussion. In that case the defendants had formed a combination of steamship companies engaged in the China trade, from which the plaintiffs had been excluded. The defendants gave notice to the China merchants that any shipments by plaintiffs' vessels would debar them from the benefit of certain rebates otherwise granted by defendants, they threatened that they would not employ any agents who would take any orders for plaintiffs, and began to charge low and ruinous rates of shipment in order to underbid plaintiffs and drive them out of the trade. The action was dismissed on the ground that the acts complained of were legitimate forms of competition incident to the ordinary course of business. Two elements distinguished that case from the present one: the absence of malice, and the presence of a combination. There was found to be no element of personal ill-will, and it was held that competition, which is a hand-to-hand fight in which the gain of the one is the loss of the other, to become unlawful, must descend to fraud, intimidation, obstruction, molestation, oppression, or intentional procurement of the violation of individual rights, and that the mere offer of a premium on exclusive dealings with defendants was not sufficient to satisfy these requirements. The acts not being unlawful if they had been done by one, were not rendered illegal by being done by several in combination. It was strongly intimated that proof of malice might have altered the aspect of the case, although it does not clearly appear whether malice would have rendered the conduct of defendants actionable *per se*, or only in conjunction with the element of combination or conspiracy.

Evidently this last point presents a question of vital interest and importance. It has now been decided by the House of Lords that malice *per se* does not constitute a cause of action; how as to malice in conjunction with combination? Does, in other words, preconcerted malicious action by several, resulting in injury to another, but lacking every element of violence, fraud, or threat of violence, present a case of actionable conspiracy?

In two, at least, of the prevailing opinions delivered in the House of Lords the view is intimated that the case might have been decided otherwise on a charge of conspiracy. Lord Shand said: "The case was not presented by the learned judge to the jury as

one of conspiracy, and does not raise any question of that kind. . . . Combination for no legitimate trade object (such as occurred in the Mogul Steamship Company case), but in pursuit really of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful; but this case raises no such question." And Lord Macnaghten says: "In order to prevent any possible misconstruction of the language I have used, I should like to add that, in my opinion, the decision of this case can have no bearing on any case which involves the element of oppressive combination."

The question then presents itself: Do the objections urged by the House of Lords against the recognition of malice as a cause of action disappear, when malice is charged against several instead of one? If the difficulty felt by the House of Lords was that an act should not become unlawful merely on account of the spirit or motive which dictated it, because that element does not furnish a satisfactory test of illegality, and may open the door to arbitrary decisions, the objection applies equally, it would seem, whether the act of one or the act of a number of people is in question.

At the same time, this answer does not dispose of the whole question. It may still be that a malicious act by several is actionable where the same act done by one would not be, not because the theory of malice suddenly loses its difficulty, but because the fact of combination imports a new and vital element.

That an act lawful if done by one should become unlawful if done by a number of persons, involves no contradiction in itself, if the act, through being done by many in concert and co-operation, assumes a new and different character. The withdrawal of patronage, the refusal to entertain social and business relations, the discrimination between different persons in making contracts of employment or otherwise, advice, recommendations, encouragement, or warnings addressed to other persons, — all these acts are expressions of individual liberty, and are lawful because without them our social and economic relations would be subjected to intolerable and arbitrary restraints. But let the same acts be done by a large number of people in accordance with preconcerted resolutions, and in organized co-operation, — and the withdrawal of relations means social isolation, discrimination is turned into persecution, the freedom of private relations into a violation of privacy, the liberty of contract into a dangerous and oppressive use of economic power. In these cases combination may make the act unlawful, not because it is malicious, but because it affects and changes the character of

the act. Upon this basis a "boycott" may be held to be illegal and even criminal, while the case of two brothers wishing to prevent their sister from concluding an unsuitable marriage, and threatening for this purpose to give up all intercourse with her if she persists in her choice, would present no element of illegality. The technical definition. of conspiracy which simply speaks of "combining" is open to the objection that it does not sufficiently discriminate between combinations which are purely private agreements or understandings and combinations which assume a public or quasi-public aspect.

The Mogul Steamship Company case was held to involve no combination of the latter kind, the case of Allen *v.* Flood no combination whatever. "The vice of that form of terrorism," Lord Macnaghten said in the latter case, "commonly known by the name of 'boycotting,' and other examples of oppressive combination, seems to depend on considerations which are, I think, in the present case conspicuously absent." The overruled opinions, however, reveal a strong undercurrent of sentiment that the action presented a case of oppression similar to a boycott, and public opinion regarded the case very clearly as one involving the practices and the power of trade-unions. Allen's warning would never have been heeded or acted upon if it had not been supposed that he had forty thousand boilermakers to back it up. The action was originally brought against the officers of the union, but the evidence failed to show that they sustained toward Allen the relation of principals, or that the union had authorized his action. That the idea of an oppressive combination was strong in the minds of the dissenting judges appears from the following quotation from the Lord Chancellor's opinion: "If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that the action of an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that if they in truth authorized him, he and they might all have been responsible, while the false statement that he made, though acting

upon the employer by some pressure because it was believed, and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false." But this point seems to be fully disposed of by Lord Herschell's answer: "It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings, no such point was raised at the trial or in the Court of First Instance, or until the junior counsel of the respondents addressed your Lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent to attach any weight to the point now." If the point had been brought before the court properly, it would have made a case of fraud or misrepresentation producing damage, and for which a liability might have been enforced; if it could have been shown that Allen acted under authority, a case of actionable conspiracy could probably have been made out; as it was, the plaintiffs presented, and the evidence substantiated, a case so favorable to the defendant, that malice remained as the only available cause of action.

The Lord Chancellor, in his dissenting opinion, cited a number of American cases. The questions raised in Allen *v.* Flood have indeed repeatedly engaged the attention of American courts. A collection of the principal authorities down to 1894 may be found in an article by W. L. Hodge on "Wrongful Interference by Third Parties with the Rights of Employers and Employed."[1] Most of the American cases, in which there was a malicious interference with the relations of third parties, will, however, on close examination, be found to involve one of three elements: an existing contractual relation not terminable at will,[2] or falsehood and misrepresentation,[3] or combination and conspiracy.[4]

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[1] 28 Am. Law Rev. p. 47.

[2] Haskins *v.* Royster, 70 N. C. 601 (1874); Jones *v.* Stanly, 76 N. C. 355 (1877); and Salter *v.* Howard, 43 Ga. 601 (1871).

[3] Benton *v.* Pratt, 2 Wend. 385 (1829); Rice *v.* Manley, 66 N. Y. 82 (1876); and Lally *v.* Cantwell, 30 Mo. App. 524 (1888).

[4] Dickson *v.* Dickson, 33 La. Ann. 1261 (1881); Baughman *v.* Typographical Union, 35 Alb. Law Jour. 226 (1887); Lucke *v.* Clothing Cutters' & Trimmers' Assembly (Md.), 26 Atl. Rep. 505 (1893); Vegelahn *v.* Guntner, 167 Mass. 92 (1896); and Curran *v.* Galen, 152 N. Y. 33 (1897).

As to acts of interference involving one of these three elements, the law appears to be fairly well settled, although the dissenting opinions in Vegelahn *v.* Guntner show that some phases of conspiracy still present considerable difficulties, and although in Kentucky the procurement of a breach of contract appears to be regarded as actionable only where the contract is one of employment.[1] Still in all these cases there is something in addition to malice which makes the tortious character of the act more intelligible or more easily acceptable.

The precise question whether it is unlawful for one person maliciously to induce another to terminate a relation which can be terminated without breach of contract, where damage results from the act, has been presented in America in the cases cited in the note.[2] The Maine and Vermont cases were decided in favor of the defendant on the ground that he acted on his own land, so that the malicious interference appeared as an act of exercise of ownership, the exercise of property rights being regarded as forbidding any inquiry into motives, and being, therefore, a sufficient defence to the charge of malice.[3] As to the Massachusetts case, it is true that one of the causes of action was interference with a contractual relation, and the dissenting opinion of Field, C. J., in Vegelahn *v.* Guntner appears to regard the case as decided upon that point; but the declaration also charged that defendant induced persons who were about to enter the employment of plaintiff to leave and abandon it, and the opinion discusses at great length the question whether malicious interference apart from existing contracts is actionable, and concludes that it is. The Florida case follows the Massachusetts decision. The California court, on the other hand, in a carefully reasoned opinion, arrives at the opposite conclusion. Under these circumstances it can hardly be said that the question at issue in Allen *v.* Flood is no longer open for discussion in this country.

When we consider the theory of the various cases dealing with malicious injury, we should eliminate all those in which there was misrepresentation. Liability for false statements made with intent

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[1] Chambers *v.* Baldwin, 15 S. W. Rep. 57 (1891).

[2] Walker *v.* Cronin, 107 Mass. 555 (1871); Chipley *v.* Atkinson, 23 Fla. 206 (1887); Boyson *v.* Thorn, 98 Cal. 578, 21 L. R. A. 233 (1893); Haywood *v.* Tillson, 75 Me. 225 (1883); and Raycroft *v.* Taynton, 68 Vt. 219 (1896).

[3] Phelps *v.* Nowlen, 72 N. Y. 39 (1878); Letts *v.* Kessler (Ohio), 42 N. E. Rep. 765 (1896).

to injure rests upon the same principles as ordinary fraud, since it can make no difference whether a false statement is made directly to the party injured, or to some third party, with the view that the act of the third party induced thereby should inflict the injury. We should eliminate all cases of violence or threats of violence, since they clearly affect the security of the person, an elementary right. We should also eliminate all cases of oppression, upon principles above explained. Not every technical conspiracy, however, amounts to oppression, or presents the features which radically alter the nature of the individual act, and there is no reason why a malicious act by two or three should be treated differently from a malicious act done by one.

Confining ourselves, then, to cases of which Walker *v.* Cronin and Boyson *v.* Thorn in America, and Allen *v.* Flood in England, are types, — cases in which one party intentionally, and, as the expression is, maliciously, inflicts injury upon another without violating one of the elementary personal rights otherwise recognized in the law of torts, — we should distinguish two questions: Should a cause of action be recognized? and: If a cause of action is recognized, how shall we define the tort, how shall we make the right violated clearly intelligible? The first question is one of legal policy; the second, one of legal doctrine; but it is partly on the ground that the doctrine is unintelligible that the cause of action has been repudiated, and the courts generally treat the two questions as one.

If an act otherwise lawful becomes unlawful because done with malice, it is necessary to recognize the existence of a right of security against malice. This right would be an extension of the sphere of what might be called social security, which is already protected by causes of action for fraud, negligence, libel and slander, and conspiracy. There would be no inherent logical objection to the recognition of such a right, provided malice were properly defined. It will not do to say, "The court will not define malice any more than it will define fraud. All plain men know what is meant by saying that a man has acted maliciously." The great objection to the present state of the law is that the term "malice" is used in a loose and vague sense, being confused with fraud, misrepresentation, and oppression. To say that malice is an unlawful purpose to cause damage and loss, without right or justifiable cause, is to tell us nothing that is specific of malice, for these elements belong to every intentional tort, and it is desirable

to define malice as a tort *sui generis*. As such malice ought to mean in law what it means in fact, the intentional infliction of damage through personal ill-will or spite, for purposes of revenge, or for illegitimate and corrupt personal ends. It is, however, clear from the decided cases that there is no absolute or perfect right to be protected against malice in this sense. It is not unlawful to use one's property to the injury of a neighbor, however malicious the use, and however clear the malice. The same is true of the exercise of any other specific right resting upon a special act of acquisition, like a right under a contract, the right of a judgment creditor, etc. If it is true that malicious injury is an actionable wrong, we must recognize the existence of the following qualification: an act by which a property right or a right resting upon special relations with others is exercised, is never deemed to be malicious. Notwithstanding a few *dicta* to the contrary, this is the established law in this country and in England.

And, furthermore, where the courts have recognized malice as a cause of action, the facts frequently fail to show the existence of malice in the true and proper sense of the term. This is especially true of the cases in which the problem of malice is most frequently discussed, those involving relations between employers and employed. Where the act complained of is done in the honest and sincere conviction that injury to another person is a necessary means to accomplish some legitimate end, that recognized social or economic interests can be accomplished only by the systematic suppression of resisting forces, — there, it seems to me, the element of malice is conspicuously absent, although there may be a clear case of conspiracy. Such cases should be judged as cases of oppression and not as cases of malice.

If, in a case like Allen *v.* Flood, we abandon the theory of malice, there remains nothing but the right to pursue one's trade or occupation as a basis for discussion. Even this, it seems to me, can be made sufficiently intelligible to be recognized as a legal right. The Lord Chancellor quotes with approval the following definition of this right from Sir William Erle's treatise on the law relating to trade-unions: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible

with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

This statement is unsatisfactory in so far as it fails to define with sufficient clearness when obstruction is lawful, and in so far as it intimates that the right is limited only by similar rights of others. Moreover, if the right is to be recognized, it should not be confined to the disposal of labor or capital.

The right would consist in the liberty to enter social as well as economic relations. It cannot, of course, be a right as against the persons with whom relations are sought, for liberty on the one side demands liberty on the other. It is a right, therefore, only against third parties; *i. e.*, a right of security against interference. It is a larger right than the right of security against malice, for to establish its violation it is not necessary to show that the interference proceeded from a specific motive, but it is sufficient to show that it is without justification. This is recognized by the cases which lay all stress upon the absence of lawful cause or excuse — which, however, ought not to be called malice.

In order to determine the extent of the right it is necessary to define the grounds of justification of interference. Two such grounds appear to be clearly recognized by the cases: First, by analogy to the law relating to malice, the exercise of some specific right of ownership or contract, or a right resting upon some other distinct title; second, upon the authority of the Mogul Steamship Company case, the exercise of a similar right by the interfering party, which constitutes competition. It seems, however, that another ground of justification should be recognized in order to place the law upon a reasonable basis. If every act of interference with the civil liberty of another, not grounded upon a superior right of property or contract, or upon the equal right of competition, were actionable, the freedom of social relations would be destroyed by over-protection. It cannot be that every act of warning which may result in injury to the party warned, or to a third party, is a legal wrong. If a right of security against interference is to be recognized, a large

and liberal exception by way of justification should be allowed under the plea of privilege.

This privilege would be similar in nature and operation to the qualified or relative privilege which, in the absence of malice, justifies a libellous communication, and would have about the same scope. As in the case of libel, it would excuse acts done in the performance of a moral or social duty, and acts of persuasion or warning based on relations of friendship or association or business. The two cases of privilege — in addition to the other grounds of justification — would probably cover all legitimate acts of interference. It is certain that if the right were once recognized, not every act of interference would be excused simply because it was honestly believed a proper means of furthering a selfish interest. In the course of argument in Allen *v.* Flood one of the judges asked whether, if a butler, on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master, preferring to keep the butler, terminated his contract with the cook, the latter could maintain an action against the butler. Another judge answered this question without hesitation in the affirmative. In such a case, however, it seems that the warning might have been justified as the exercise of a special right, viz., the right to terminate a relation to which one is a party. Had the House of Lords recognized a right of security against interference, the question would have been: Was Allen's act covered by privilege? The Lord Chancellor clearly states that in his opinion it was not. "In my view his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do." It should be said that in the usual cases between employers and employees this question would rarely require an answer, since they are generally covered by the rule against oppressive combination which recognizes no privilege. Evidently the successful establishment of a right against interference would depend upon a satisfactory definition of the privilege which excuses interference; and while this privilege can hardly be compressed into a formula, it would be rash to say that the courts could not succeed gradually in laying down its limitations with sufficient certainty for practical purposes.

On the whole, there seems to be no greater difficulty in defining a right of security against malice or against interference than in defining a right of security against negligence, and the difficulty is probably less. So far, however, the courts which propose to pro-

tect these rights have not undertaken to define them, and this has been given by the House of Lords as a reason why their recognition should be refused. To leave the whole question as one of malice simply to the jury, is certainly a most unsatisfactory solution of the problem.

Much graver objections might be urged against these rights upon the ground of legal policy. Should the law undertake to regulate the conflict of interests otherwise than by forbidding violence, fraud, and perhaps the oppressive use of the power of association? Should it secure a right to fair play? It may be admitted that the development of social sentiment demands a constantly rising standard of conduct in the pursuit of conflicting interests, without concluding that the law needs to follow *pari passu* with its remedies, which at present are certainly not adequate to work out a perfect realization or protection of rights of great delicacy. It is, however, also true that social sentiment to-day is very apt to seek and find expression in the law, and argument counts for very little in the face of such a tendency. Even in England it is almost certain that the decision in Allen *v.* Flood does not conclude the development of this phase of the law. If legal rights are to be extended in the direction suggested by this case, it will be incumbent upon the courts to distinguish malice from oppressive conspiracy, to define the meaning of malice, and to determine whether and to what extent, in the absence of malice, a right of security against interference should be recognized.

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